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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
HUGH LONG,)	
Employee)	OEA Matter No. 1601-0026-18
)	
v.)	Date of Issuance: June 19, 2019
)	
UNIVERSITY OF THE)	
DISTRICT OF COLUMBIA,)	MONICA DOHNJI, ESQ.
Agency)	Senior Administrative Judge
)	

Hugh Long, Employee, *Pro Se*
Anessa Abrams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 1, 2018, Hugh Long (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the University of the District of Columbia’s (“Agency” or “UDC”) decision to terminate him from his position as a Police Officer, effective January 2, 2018. Employee was terminated for failure to qualify with his firearm on the required range and integrity violations. On April 12, 2018, Agency filed its Answer to Employee’s Petition for Appeal.

I was assigned this matter on August 8, 2018. Thereafter, I issued an Order scheduling a Status/Prehearing Conference for September 18, 2018. Following the receipt of Agency’s Motion to Reschedule, I issued another Order rescheduling this matter for October 24, 2018. On October 31, 2018, Employee requested that this matter “be postponed until April, May or June 2019 unless my legal counsel acting on my behalf or myself file a motion for Prehearing Conference ... to be held at an earlier date.” Employee’s request was denied, and the matter rescheduled for January 8, 2019 with both parties present. Thereafter, on January 9, 2019, I issued a Post Status/Prehearing Conference Order requiring the parties to address the issues raised at the January 8, 2019, Conference. Both parties have submitted their respective briefs. After considering the parties’ arguments as presented in their submissions to this Office, I have decided that there are no material facts in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE(S)

Whether Agency violated Employee's Due Process Rights

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA.

Employee's Position

In his Petition for Appeal, Employee submits that ... "I believe false statements were made and I was fired because of previous grievance that I made to my union ... in reference to chief Marieo Foster's unfair labor practices..." Employee also states that he passed the firearms qualification test, thus, he was wrongfully terminated. Employee asserts that Chief Foster and Commander Treadwell are attempting to enforce invisible rules and policies that are not in writing in an official capacity in the UDC Police General Order and/or Standard Operating Procedure that is utilized by police departments and professional organizations. Employee explains that he has not seen or received any written rules since his hiring in 2016, stating UDC policies and procedures. Employee maintains that Agency has no clear written rules or action plan, except for word of mouth.

Employee argues that there were no rules posted on the range at the time of the incident (September 8, 2017) regarding the taking of pictures and/or videos. He states that, Lieutenant Blackmon sent out an email regarding video recording in October 2017, after the alleged incident occurred. Employee reiterates that prior to October 27, 2017, Agency had no written directives in reference to range rules. He maintains that Agency management made up these rules when it was beneficial to them. Also, Employee notes that there is no expectation of privacy in a public forum.

Employee avers that the January 2017, remedial firearms training was unnecessary because he did not fail the firearms range qualification. He states that he passed the firearms range qualification and he was informed of his results both verbally and in writing by the instructor Orlando Treadwell. He maintains that he signed the certificate which was presented to him by Treadwell in the presence of Lieutenant Donald Whiting. Employee notes that apart from the second remedial training in October of 2017, he was not aware of any other remedial trainings.

Employee also states that the UDC police department does not have any General Orders and/or Standard Operation Procedures ("SOP") in place, referencing the firearms range qualification. He asserts that he qualified both at the Protective Services Training Academy ("PSTA") range on January 13, 2017 and the Maryland Small Arms Range. He also states that his score on October 24, 2017 was 43, which is a passing score for the MPD Semi-Automatic course. This was witnessed by his union representative Sonny Garibay, Katrina Bruce of Human Resources, Captain Smith and Lieutenant Blackmon. He also highlights that his official job description and/or union contract does not make reference to having to qualify with firearms at specific approved range. He argues that the UDC police department has used PSTA and Maryland Smalls Arms ranges in past practices for firearms qualification. He reiterates that the Maryland Small Arms Range and the PSTA ranges are both approved by the MPD Security Officers Management Branch ("SOMB"), as well as for Campus Special Police Officers to satisfy the requirements of title 6A set forth by the MPD department that they are governed by.

Employee contends that, for the semi-annual firearms qualification, he was required to have a 38 out of 50 to pass the firearms test. He hit 40 out of the 50 targets which represented a passing score, and Instructor Treadwell issued him a passing firearms range certificate on January 13, 2017. He again passed the firearms range test on June 29, 2017, with Instructor Treadwell. Because Campus Police are required to be tested every six (6) months, he met this requirement and satisfied Title 6A on January 13, 2017 and on June 27, 2017.

Regarding weapons handling and gun safety, Employee states that despite the integrity issues listed by the Chief Fisher, Instructor Treadwell has never stated any concerns to him, in reference to his weapons handling or him being unsafe with firearms. He avers that, if he exhibited unsafe weapons handling, he would not have been allowed to shoot, qualify or handle the firearm. He explains that if you are unsafe with the firearm at the range, you are immediately disqualified, and the instructor will take your firearm from you and immediately escort you off the range. Employee maintains that he handles all firearm as if it is loaded with care, safety, proper weapons handling techniques, and with respect to protecting life. He has never been escorted off the range by Instructor Treadwell for violation.

Employee states that, Instructor Treadwell and Chief Foster would be considered negligent for signing off on the passing range certificate if he, Employee was not safe with his handling of firearms and he was a risk to the overall security of UDC and the District. Employee argues that the university would not have submitted his paperwork to the SOMB to obtain an armed special police commission if he were a danger to public safety. He also explains that if he was not fit and qualified to handle a firearm, Chief Foster would not have sponsored him for the license from the MPD SOMB and the Mayor would have denied his Armed Special Police Commission. He further states that his Commission/License was granted, and he has a certificate that states that he successfully completed the MPD's firearms Safety Course. Employee states that the District only required a Special Police Officer ("SPO") to shoot at a particular range or with a certain instructor and that, the hiring job

announcement does not mention anything about qualification at a certain range and qualifying with a UDC approved instructor. Moreover, the union contract does not require a UDC SPO to fire at any particular or specific gun range.

Employee avers that on October 24, 2017, Adrian Blackmon loaded his magazines while Captain Cetrina Smith assisted him for the actual firearms qualification. He asserts that he did not load his ammunition for the firearms qualification. He also argues that there are no General Orders and/or Standard Operating Procedures for firearms integrity violations. Employee however, admits that he erroneously loaded 17 rounds in his magazine on the test date because that is what he does everyday at work. He explains that because they wear double ear protections, the noise and his lack of familiarity of the new MPD course he was presented with on September 8, 2018, contributed to the error. Employee states that this error did not present a safety nor integrity violation, he instead attributed the error to miscommunication. Furthermore, there is no evidence that absent the human error, he would have received a higher score. Employee also admits to firing one round over the number instructed. He explains that, this happens often with MPD Police Officers and Special Police Officers. Employee also acknowledged that, on September 8, 2017, he forgot that he had his personal magazine on his duty belt, which he removed and did not intend on using the magazine to cheat. He further explains that his personal magazine was found empty as he used it at the Maryland Small Arms Range the prior night. He contended that he did not intentionally violate range rules.

In his brief, Employee reiterates his position as presented in his Petition for Appeal.¹ He maintains that he met all the firearms requirements of the Metropolitan Police Department. He completed the 40 hours Armed Special Police course and passed all portions of training to include the firearms qualification. Employee also states that he does not have any disciplinary action in his file and that Agency did not engage in progressive discipline. He notes that none of the Douglas factors were applied or considered by Agency. He states that if the Douglas factors were considered, an alternate outcome such as a written reprimand, suspension, or being placed on a Performance Improvement Plan (“PIP”) could have been reached.

Employee argues that Agency violated his due process rights. He maintains that he was never issued a Notice of Proposed Removal. He only received a Notice of Termination. Employee additionally asserted that his union rights were violated. He explains that he asked for union representation on December 18, 2017 when he was issued the Notice of Termination, however, he was not provided one.

Employee mentions that if he had committed a weapon handling offense, he would have been disqualified from the firearms course. In support of his assertion, he states that Officer Tyra Gleaton was disqualified by Instructor Treadwell. He maintains that the university failed to specify in detail the exact weapon handling offense he is being charged with. In addition, Employee explains that remedial training is for those who failed a firearm range qualification. Because he had passed this qualification in January 2017, the October remedial training was pointless. Employee submitted a Reply Brief on May 31, 2019, wherein, he notes that he passed the MPD’s Armed Special Police Firearms Qualification Course on January 13, 2017 and June 29, 2017. He also states that there was no MPD Armed Special Police Officer Firearms Qualification test given to him on January 24, 2017.

¹ Brief of Hugh Long (April 26, 2019).

Agency's Position

Agency asserts that Employee was a member of the American Federation of State, County and Municipal Employees ("AFSCME") District Council 20, Local 2087 union. According to the Collective Bargaining Agreement ("CBA") between Employee's union and Agency, Employee was required to serve a one (1) year probationary period. He was also required to obtain and maintain Special Police Officer status throughout the District, and meet prescribed requirements and qualifications associated with SPO status to include firearms and other weapons systems.² Agency explains that, Employee's job description required proficiency in the care and use of firearms, and all incumbents were required to successfully complete all related training, including firearms and any requalification(s) as needed. Agency also states that pursuant to 6-A DCMR 1200.8(e), armed campus and university officers are required to qualify with their firearms on a semi-annual basis.

Agency contends that Employee failed his weapons qualification training. Agency notes that Employee completed a forty (40) hour block of instruction mandated by Security Officers Management Branch ("SOMB") of the Metropolitan Police Department ("MPD"). Employee was also required to qualify with his service weapon. The qualification was determined by numeric scores and observation of competent weapons handling skills. Agency states that the graded numeric requirement mandated that Employee earn a score of thirty-eight (38) out of fifty (50) at an approved gun range using his service weapon.³ Agency explains that Employee reported for the qualification test on January 13, 2017 and scored a forty (40) on the numeric portion but failed to demonstrate competent weapons handling ability. Agency maintains that Employee was continuously warned by the instructor about various safety infractions. Accordingly, Employee did not pass his required weapons qualification session. Agency asserts that based on Employee's overall performance, he was placed on a remedial program of eight (8) additional hours of classroom training and an additional two (2) hours of range time.⁴

In addition, Agency asserts that Employee failed to satisfy the requirements of the remedial training course and failed his weapons qualification session. Agency avers that Employee did not improve after receiving remedial training. On January 24, 2017, he attempted to qualify for firearms at a remedial range training. This was a two (2) hours session, with the first hour conducted under no-time pressure and the second hour conducted under time pressure. During the first hours, Employee did not hit any of the targets. The course was restarted and during the last hour, Employee hit two (2) targets. The training session was terminated.⁵

Agency mentions that on June 29, 2017, a day before the end Employee's probationary period, Employee was allowed the opportunity to the qualification requirements with his firearms. Agency states that UDC Police Department ("UDCPD") required all its officers to become certified with their service weapons at the Protective Services Training Academy ("PSTA") range. Agency explains that the PSTA utilizes a modern operation that the UDCPD found better trains and equips officers for the realities of their day to day job. However, Employee showed up at a non UDCPD range for his firearm assessment on June 29, 2017. During the session, Employee showed minimal improvement and achieved minimal numeric qualification. He was informed he would not be issued

² Agency's Answer to Employee's Petition for Appeal (April 12, 2018).

³ *Id.* at pg. 2.

⁴ *Id.*

⁵ *Id.*

a weapon until he satisfied the firearms proficiency assessment and qualify at a primary PSTA range.⁶

Furthermore, Agency asserts that in September of 2017, Employee again attempted to satisfy the weapons qualification. Specifically, on September 9, 2017, Employee scored a thirty-four (34) out of fifty-two (52). The minimum passing score for the PSTA range was a forty-three (43) out of fifty-two (52).

Agency argues that in addition to demonstrating poor shooting accuracy, the instructor noted that Employee failed to follow course-of-fire instructions. Specifically, Employee fired an additional round over the number instructed; he loaded three (3) magazines with seventeen (17) rounds instead of the instructed three (3) magazines with fifteen (15) rounds; and it was discovered that Employee had two empty 10-round Glock magazines in his pocket. The instructor viewed these as integrity violations.⁷

Agency further states that on October 24, 2017, Employee again reported to the PSTA range in an attempt to satisfy the weapons qualification. However, after the training, the instructor stated that the remedial training program had reached its maximum potential for Employee and concluded that Employee “still does not effectively cope with the demands of live fire situation.”⁸ On October 25, 2017, Agency required Employee to surrender his armed SPO commission and UDCPD badge and identification. Employee was reissued a standard UDC identification card until a decision was made about his continuing tenure with UDC. According to Agency, Employee was notified in a letter dated December 18, 2017, that his employment was terminated effective January 2, 2018.⁹

In its Brief and Reply Brief, Agency reiterates its position as stated in its answer. Agency also argues that Employee was not terminated in retaliation for filing a grievance. He was terminated for failing to pass the weapons qualification training on the PSTA required range and for his multiple integrity violations.¹⁰ Citing to a transcript from a deposition conducted on January 4, 2019, wherein, Employee was deposed by Agency, Agency explains that Employee has admitted to demonstrating poor weapons handling and safety issues during various aspects of his training, in addition to his integrity violations.¹¹ Agency maintains that it had cause to terminate Employee after he failed to qualify with his service weapons multiple times and for multiple integrity violations. Agency asserts that the ability to safely handle weapons is of paramount importance to the role of a police Officer and Employee’s job description emphasizes proficiency in the care and use of a firearm.

Agency avers Employee may not attempt to amend his Petition for Appeal through his brief. Citing to OEA rule 608.3, Agency argues that Employee’s due process argument must be rejected because any amendment at this stage will result in severe prejudice to the university. Agency explains that the parties have already engaged in discovery, and as such, Employee can only challenge his termination based on retaliation.¹² Agency further contends that there is no authority

⁶ *Id.*

⁷ *Id.* at pgs. 5-6.

⁸ *Id.* at pg. 7.

⁹ *Id.*

¹⁰ Brief of the University of the District of Columbia (March 27, 2019); *See also* Reply Brief of the University of the District of Columbia (May 13, 2019).

¹¹ Brief of the University of the District of Columbia, *supra*, at Exhibit B.

¹² Reply Brief of the University of the District of Columbia, *supra*.

that supports the use of the Douglas Factors, and even if there was one, the Douglas factors support Employee's termination. Also, Agency argues that there is no evidence that Agency failed to consider the relevant factors.¹³

Due Process violation – Notice of Proposed Removal

Employee argued that Agency violated his due process rights. He maintained that he was never issued a Notice of Proposed Removal. He only received a Notice of Termination. In response, Agency asserted that Employee's due process argument must be rejected because any amendment at this stage will result in severe prejudice to the university as the parties had already engaged in discovery. Agency explained that the parties have already engaged in discovery, and as such, Employee can only challenge his termination based on retaliation.

The U.S. Supreme Court has held that "the root requirement" of the Due Process Clause requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."¹⁴ This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.¹⁵ Affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.¹⁶ The pre-termination "hearing," though necessary, need not be elaborate.¹⁷ "[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."¹⁸ The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement.¹⁹

In the instant matter, Agency does not dispute that it never generated/provided Employee with a Notice of Proposed Removal.²⁰ It only argued that Employee did not timely raise this issue. I find that Employee's failure to timely raise the issue of his due process violation is not prejudicial to Agency. Regardless of when the due process issue would have been raised, the outcome would have been the same because Agency had already terminated Employee when he filed his Petition for Appeal, without providing him with a Notice of Proposed Action. Furthermore, Employee is a *pro-se* litigant, and cannot be held to the same standard as a represented litigant like Agency when analyzing when and how issues should be raised. As long as the record is still open, it is within the discretion of the Administrative Judge to accept and amend the issues presented. And in the instant matter, the undersigned will review Employee's due process violation allegations. Moreover, the District rules and regulations mandate that District agencies provide their permanent employees affected by an adverse action with the opportunity to be heard. I find that Agency's violation of Employee's due

¹³ *Id.*

¹⁴ *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532 (1985) (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

¹⁵ *Board of Regents v. Roth*, 408 U.S. 564 (1972).

¹⁶ *Loudermill*, 470 U.S. 532.

¹⁷ *See Cleveland Bd. Of Educ. v. Loudermill*, *supra*, (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

¹⁸ *Loudermill*, 470 U.S. 532.

¹⁹ *Id.*

²⁰ Agency's Answer, *supra*, at Exhibit 8. Based on Agency's admission, following the October 24, 2017, training, Agency required Employee to surrender his armed SPO commission, his UDCPD badge and identification, and issued him a standard UDC staff identification on October 25, 2017. Agency issued a Notice of Termination to Employee on December 18, 2017, without first issuing a notice of proposed removal. Agency's Answer at pg. 8.

process right is more egregious and prejudicial to Employee than Employee's untimely filing of the due process claim to Agency. I further find that Agency's action constitutes harmful error.²¹

Furthermore, here, as with most adverse actions taken by District government agencies against its employees, and in accordance with Section 1618 of the District Personnel Manual ("DPM"), Agency was required to provide Employee with a fifteen (15) day *notice of proposed action* of the charges levied against Employee. Section 1618 of the DPM sets forth enumerated requirements that the notice of proposed action should afford Employee. These rights satisfy the due process requirements to which Employee was entitled. Agency completely ignored the requirements of section 1618 of the DPM in terminating Employee, thereby violating his due process rights.²² Therefore, I find that, because Agency violated Employee's due process rights, all the other issues raised by the parties throughout the course of this appeal are moot and will not be addressed. Accordingly, the adverse action of removal must be reversed, and Employee must be afforded a "new constitutionally correct removal procedure."²³

ORDER

Based on the foregoing it is hereby **ORDERED that:**

1. Agency's termination of Employee is hereby **REVERSED**.
2. Agency shall reinstate Employee to the same or comparable position prior to his termination.
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of his removal.
4. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

²¹ OEA Rule 631.3 provides that: "Notwithstanding any other provisions of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take action."

²² Employee also argued that the Douglas factors were not considered in his case. Because the undersigned has found that Agency violated Employee's due process rights by failing to provide him with a notice of proposed removal, the issue of whether Agency considered the Douglas factors is now moot.

²³ *Ward v. U.S. Postal Service*, 634 F.3d 1274 at 1279-1280 (Fed. Cir. 2011). See also *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999)).